



## The Supreme Court Tips its Hat to Employers – Or Does It? Vicarious Liability After *Vance v. Ball State University*.

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This term, the United States Supreme Court rendered two employer-friendly decisions under Title VII. In one of those decisions, the court held that employers could be held vicariously liable for employee conduct only when that employee was “empowered by the employer to take tangible employment actions against the victim.” *Vance v. Ball State University*, 2013 WL 3155228, \*3 (June 24, 2013). The court championed its decision as a veritable “bright line” rule that would simplify complicated Title VII litigation. *Ball State*, 2013 WL 3155228 at \*7.

*Ball State* came to the Supreme Court on a workplace harassment claim set against the backdrop of two prior Supreme Court decisions – *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In those decisions, the court held that an employer may only be vicariously liable under Title VII for the conduct of a supervisor. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. In both decisions, however, the court stopped short of defining “supervisor.”

Petitioner Vance sued Ball State University under Title VII claiming that an employee had created a racially hostile work environment. *Ball State*, 2013 WL 3155228 at \*3. The parties disputed the harassing employee’s responsibilities, but agreed that she did not have the authority to hire, fire, demote, promote, transfer or discipline petitioner. *Id.* The district court granted summary judgment, finding no vicarious liability because the harassing employee could not take tangible actions against petitioner, and finding no negligence because Ball State responded reasonably to the incidents it knew of. *Id.* The Seventh Circuit affirmed. *Id.*

In a 5-4 decision, the Supreme Court held that an “employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.” *Id.* at \*3. If the harassing employee is not so empowered, the employer is judged by a negligence standard and may avoid liability entirely by proving an affirmative defense that: “(1) [it] exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) that the [plaintiff-employee] unreasonably failed to take advantage of any preventative or corrective opportunities that were provided.” *Id.* at \*6.

This “*Ball State* Rule” has been adopted by a number of circuits, including the Eighth Circuit. *Id.* at \*16. Yet other circuits have adopted EEOC guidance which defines “supervisor” as individuals empowered to take tangible actions *and* individuals who control the daily activities of the victim. See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors 1999 WL 33305874 (1999). The court found the EEOC guidance ambiguous, claiming that the *Ball State* Rule was easier, more user-friendly, and a vehicle to streamline Title VII cases. 2013 WL 3155228 at \*7. Unfortunately, reality might not be quite that simple.

To significantly impact Title VII vicarious liability and reduce claims, the *Ball State* Rule would need to be applied consistently and uniformly such that plaintiffs and employers alike understand that an employee is only a “supervisor” if he or she is empowered to take certain actions. Ideally, there would be no exceptions. Yet that the court expressly created one.

Addressing the dissent’s concerns that an employer would simply concentrate the ability to take tangible actions to a few employees (a logical conclusion from *Ball State*), the court explained that if an employer did so “... the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.” 2013 WL 3155228 at \*15. In other words, vicarious liability applies only to the actions of a “supervisor” unless, well, it applies to the actions of someone who is not. The mere existence of an exception like this one might swallow the rule entirely.

It is still unclear how the courts will sort out the *Ball State* Rule or its exception. In the meantime, an employer can take affirmative steps to develop (or reinforce) policies and training to educate its employees on the limitations of each employee’s role, and to address harassment when it occurs. In addition, if an employer finds itself in litigation where vicarious liability is an issue, that employer would be wise to consult trial counsel with a clear understanding of the *Ball State* decision, its application and its exceptions.